LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
JUN 28 1971
E. ROBERT SEAVER, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. ~~1592~~ 70-126

WILLARD RHOADES,
Petitioner,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF FOR RESPONDENT IN OPPOSITION

EVELLE J. YOUNGER
Attorney General of the State of California

DORIS H. MAIER
Assistant Attorney General

DANIEL J. KREMER
Deputy Attorney General

LOREN E. McMASTER
Deputy Attorney General

500 Wells Fargo Bank Building
Fifth Street and Capitol Mall
Sacramento, California 95814
Telephone: (916) 445-8575

Attorneys for Respondent

printed in CALIFORNIA OFFICE OF STATE PRINTING

TOPICAL INDEX

	Page
OPINION BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
QUESTIONS PRESENTED	2
STATEMENT OF THE CASE	3
ARGUMENT	5
I. PUBLIC LAW 280 (ACT OF AUGUST 15, 1953, 67 STAT. 588, 18 U.S.C. § 1162) AUTHORIZES THE ENFORCEMENT OF CALIFORNIA PUBLIC RESOURCES CODE § 4291, A FIRE SAFETY STATUTE, AGAINST PETITIONER, A CALIFORNIA INDIAN LIVING ON LAND HELD IN TRUST BY THE UNITED STATES FOR THE BENEFIT OF CALIFORNIA INDIANS	5
A. Public Law 280 Evinces Congressional Intent to Extend California's Criminal Jurisdiction to Indian Lands and Land Held in Trust for the Indians	5
B. A Fire Safety Statute Which Requires the Owner or Occupier of Property in a Mountainous Area to Maintain a Firebreak Around Buildings Does Not "Encumber" the Property	11
II. THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT DID NOT BAR THE PROSECUTION OF PETITIONER	15
CONCLUSION	17

TABLE OF AUTHORITIES CITED

CASES

Page

American Safety Razor Corp. v. United States, 6 F.Supp. 293, supplemented 7 F.Supp. 196 (Ct.Cl. 1934), cert. denied, 293 U.S. 599 ---- 16

Anderson v. Gladden, 293 F.2d 463 (9th Cir. 1961), cert. denied, 368 U.S. 949 ---- 6

Angermeier v. Borough of Sea Girt, 27 N.J. 298, 142 A.2d 624 (1958) ---- 12

City of Moline Acres v. Heidbreder, 367 S.W.2d 568 (Mo. Sup. Ct. 1963) ---- 12

Euclid v. Amber Realty Co., 272 U.S. 365 (1926) ---- 12

Kelly v. Washington, 302 U.S. 1 (1937) ---- 9

Kirkwood v. Arenas, 243 F.2d 863 (9th Cir. 1957) ---- 13

MacFarlane v. Department of Alcoholic Bev. Control, 51 Cal.2d 84, 330 P.2d 769 (1958) ---- 15

Macias v. Commissioner of Internal Revenue, 255 F.2d 23 (7th Cir. 1958) ---- 15

Miller v. Schwinn, 113 F.2d 748 (D.C. Cir. 1940) ---- 13

Nectow v. Cambridge, 277 U.S. 183 (1928) ---- 12

Oklahoma Tax Comm'n v. Texas Co., 336 U.S. 342 ---- 14

Organized Village of Kake v. Egan, 369 U.S. 60 (1962) ---- 5

People v. Rhoades, 12 Cal.App.3d 720, 90 Cal.Rptr. 794 ---- 1

Reid v. Colorado, 187 U.S. 137 (1902) ---- 9

Smeltzer v. White, 92 U.S. 390 (1875) ---- 16

Snohomish County v. Seattle Disposal Company, 70 Wash.2d 688, 425 P.2d 22 (1967), cert. denied, 389 U.S. 1016 ---- 12, 13-14, 15, 16

Town of South Ottawa v. Perkins, 94 U.S. 260 (1876) ---- 15

Van Antwerp v. United States, 92 F.2d 871 (9th Cir. 1937) ---- 16

Zahn v. Board of Public Works, 274 U.S. 325 (1927) ---- 12

CONSTITUTION

United States Constitution, Fourteenth Amendment ---- 2

CODES

United States

	Page
18 U.S.C. § 1162 (Public Law 280)	2, 3, 5, 6, 7, 8, 9, 11, 13
18 U.S.C. § 1162(b)	6, 7–8
28 U.S.C. § 1254(1)	2
28 U.S.C. § 1257(3)	2
28 U.S.C. § 1360	5, 12

California

Public Resources Code § 4291	2, 3, 4, 6, 7, 8, 9, 10, 11, 12, 15, 16, 17
Public Resources Code § 4291(a)	11

REGULATIONS

United States

25 C.F.R., part 131	10
25 C.F.R., part 141	10
25 C.F.R., part 141.3	8
25 C.F.R., part 141.3(a)(5)	8
25 C.F.R., part 141.9	10
25 C.F.R., part 151	10

RULES

United States Supreme Court, Rule 22 (Revised)	2

MISCELLANEOUS

Opinion M-36768, of the Solicitor of the Department of the Interior	8, 9, 14, 16
H.R. Rep. No. 848, 83d Cong., 1st Sess. (1953), 2 U.S. Code, Cong. & Admin. News 2409 (1953)	6
H.R. 1063, 83d Cong., 1st Sess.	7
99 Cong. Rec. 9962 (1953)	7

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 1592

WILLARD RHOADES,

Petitioner,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeal of the State of California, in and for the Third Appellate District, was filed on November 5, 1970, and is reported at 12 Cal.App.3d 720, 90 Cal.Rptr. 794. A copy of this opinion is attached to petitioner's brief and marked Appendix A. The California Supreme Court denied a hearing on January 28, 1971. A copy of that order is attached to petitioner's brief and marked Appendix D. The opinion of the Appellate Department of the California Superior Court, in and for Shasta County, was filed on January 27, 1970, and is unreported. A copy of this opinion is attached to petitioner's brief

and marked Appendix B. The judgment of the California Justice Court, Burney Judicial District, County of Shasta, was entered on August 11, 1969, and is unreported. A copy of the judgment is attached to petitioner's brief and marked Appendix C.

JURISDICTION

Since the instant petition for writ of certiorari was filed on April 17, 1971, and since the order of the Supreme Court of the State of California denying a hearing was entered on January 28, 1971, the jurisdiction of this Court is timely invoked under 28 U.S.C. § 1257(3), and Rule 22 of the Revised Rules of the Supreme Court of the United States. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(3) rather than 28 U.S.C. § 1254(1) as alleged by petitioner.

STATUTES INVOLVED

The relevant statutes are set forth in Appendix A. They are the following:

California Public Resources Code § 4291
18 U.S.C. § 1162
United States Constitution, Fourteenth Amendment

QUESTIONS PRESENTED

1. Does Public Law 280 (Act of August 15, 1953, 67 Stat. 588, 18 U.S.C. § 1162) authorize the enforcement of California Public Resources Code § 4291, a fire safety statute, against petitioner, a California Indian, living on land held in trust by the United States for the benefit of California Indians?

2. Does Public Law 280, 18 U.S.C. § 1162, provide sufficient warning compatible with the due process clause of the Fourteenth Amendment that conduct in violation of state law will result in a criminal prosecution?

STATEMENT OF THE CASE

On October 28, 1968, a complaint was filed in the California Justice Court of the Mountain Judicial District, Shasta County, charging petitioner with violation of Public Resources Code § 4291, a misdemeanor, in that he failed to maintain a firebreak of not less than 30 feet around a building occupied by him. A copy of this complaint is attached hereto and marked Appendix B. On December 6, 1968, an amended complaint was filed in the California Justice Court of the Burney Judicial District, Shasta County, repeating the above charge and setting forth facts on which the complaint was based. A copy of this complaint is attached hereto and marked Appendix C.

Petitioner is a California Indian and makes his home on the Big Bend Rancheria, which is held in trust by the United States for California Indians. An inspection of his property by Officer Kittell of the State of California Forest Service revealed that garbage, general debris, papers, dried grass, old wood, and leaves, all constituting fire hazards, were present on the property within 30 feet of a building in violation of Public Resources Code § 4291 (Appendix C).

On February 24, 1969, petitioner was arraigned on the complaint and entered a plea of not guilty. The

case was set for trial by jury and on July 8, 1969, the jury returned its verdict, finding petitioner guilty of violation of Public Resources Code § 4291.

The case was appealed to the Appellate Division of the California Superior Court, in and for Shasta County. Petitioner filed the following proposed settled statement of facts on appeal which was concurred in by respondent:

> "Sufficient facts were found at the trial hereof to convict the appellant of a violation of Section 4291 of the Public Resources Code of the State of California if that section is applicable to Indian trust lands. It is conceded that at the time and place charged the appellant did not maintain the firebreak required by that section."

A copy of the proposed settled statement of facts and respondent's concurrence thereto is attached hereto and marked Appendix D.

On January 27, 1970, the Appellate Department of the California Superior Court filed a memorandum decision reversing the judgment of conviction entered in the California Justice Court of the Burney Judicial District. A copy of this opinion is attached to petitioner's brief and marked Appendix C.

On March 13, 1970, the case was transferred on certification to the California Court of Appeal, in and for the Third Appellate District. On November 5, 1970, the California Court of Appeal, in and for the Third Appellate District, filed its opinion affirming the judgment of the California Justice Court of the

Burney Judicial District, and reversing the judgment of the Appellate Department of the California Superior Court, in and for the County of Shasta. This opinion, which is attached to petitioner's brief and marked Appendix A, is reported at 12 Cal.App.3d 720, 90 Cal.Rptr. 794. The Court of Appeal held that 18 U.S.C. § 1162 authorizes enforcement of California Public Resources Code § 4291 against petitioner.

On January 28, 1971, the California Supreme Court denied petitioner's petition for a hearing.

ARGUMENT

I. Public Law 280 (Act of August 15, 1953, 67 Stat. 588, 18 U.S.C. § 1162) authorizes the enforcement of California Public Resources Code § 4291, a fire safety statute, against petitioner, a California Indian living on land held in trust by the United States for the benefit of California Indians

A. Public Law 280 Evinces Congressional Intent to Extend California's Criminal Jurisdiction to Indian Lands and Land Held in Trust for the Indians.

In 1953 Public Law 280 was enacted by Congress which granted to several states, including California, full civil and criminal jurisdiction over offenses committed in Indian country and over civil causes of action which arose on Indian lands. 67 Stat. 588, 18 U.S.C. § 1162, 28 U.S.C. § 1360. *Organized Village of Kake* v. *Egan*, 369 U.S. 60, 72 (1962).

The language of 18 U.S.C. § 1162, which is set forth in full in Appendix A, makes it clear that California's criminal laws may be enforced against petitioner so long as those laws do not constitute an "encumbrance . . . of any real property . . . that is held in

trust by the United States . . .'' The legislative history of Public Law 280 indicates that it was the intent of Congress to turn over the responsibility of application and enforcement of the law with respect to Indians and Indian country to the States. The House Committee on Interior and Insular Affairs, who considered the measure, stated the following:

> "This legislation, . . . has two coordinate aims: First, withdrawal of Federal responsibility for Indian affairs wherever practicable; and second, termination of the subjection of Indians to Federal laws applicable to Indians as such." H.R. Rep. No. 848, 83d Cong., 1st Sess. (1953), 2 U.S. Code, Cong. & Admin. News 2409 (1953).

A United States Court of Appeals, in interpreting Public Law 280, made the following comments:

> "In unambiguous terms, Public Law 280 withdrew federal jurisdiction over offenses committed in specified areas of Indian country by the grant of exclusive criminal jurisdiction therein to five designated states." *Anderson* v. *Gladden,* 293 F.2d 463, 466 (9th Cir. 1961), *cert. denied,* 368 U.S. 949.

Petitioner initially contends that California Public Resources Code § 4291 is a land use regulation and thus cannot be enforced against petitioner because of that portion of 18 U.S.C. § 1162(b) which provides as follows:

> "Nothing in this section . . . shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto. . . ." (Petition, page 5.)

It should be noted that the legislative history of the Act demonstrates that Congress intended that all state and local police power regulations, even those regulating land use, are to apply to lands held in trust for Indians. H.R. 1063, 83d Cong., 1st Sess., which eventually became Public Law 280, contained the following language in section 5 when introduced:

> " . . . Provided, that as long as the title to any real or personal property, including water rights, belonging to any Indian or Indian tribe, band, group, or community is held in trust by the United States or is subject to restrictions against alienation under any law, treaty, or agreement of the United States, nothing in this section shall authorize the alienation, encumbrance, or taxation of such property or the adjudication *or regulation of its use,* or shall confer jurisdiction upon the State courts in any civil action, probate, or other proceeding affecting the ownership, title, possession, or any other interest in such property." 99 Cong. Rec. 9962 (1953). (Emphasis added.)

Before the bill was enacted into law, this language was deleted in favor of a prohibition of land use regulation only when such was inconsistent with federal law. Thus, Congress determined that the States should be free to regulate the use of Indian land except when such regulation conflicted with federal law.

In alleging that California Public Resources Code § 4291 is in conflict with federal law, petitioner directs us to no specific Federal treaty, agreement, statute,

or regulation.[1] Instead, petitioner asserts that Opinion M-36768 of the Solicitor of the Department of the Interior is binding authority for the proposition that California does not have jurisdiction over Indian trust land. This opinion is erroneous since it totally ignores and misreads 18 U.S.C. § 1162. Subsection (b) of 18 U.S.C. § 1162 provides, in part, the following:

> "Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property . . . that is held in trust by the United States . . ."

The Department of the Interior's conclusion would mean that this language is totally superfluous. If Congress had intended that trust lands be exempted from state laws, there would have been no need for the above language. However, the statute reads that state laws apply to trust lands so long as there is no alienation, encumbrance or taxation of the property, as well as no land use regulation in conflict with federal law. The inclusion of this language conclusively demonstrates that it was the intent of Congress to include Indian trust lands in the grant of power to

[1] Petitioner does assert on page 7 of his brief that California Public Resources Code § 4291 is in direct conflict with 25 C.F.R. § 141.3(a)(5). This argument is totally without merit. A close reading of the entire section reveals that it has reference to Indian *forest lands* and not land on which Indian homesites or other structures are maintained. (The complete text of 25 C.F.R. § 141.3 is set forth in Appendix E.) The regulation concerns the development, preservation, and harvesting of Indian forest land. A requirement of a firebreak around structures does not in any manner conflict with the provisions of this regulation.

the states under Public Law 280, the conclusion to the contrary of Opinion M-36768 notwithstanding.

In any event, Public Resources Code § 4291 is not merely a land use regulation, rather it is a fire safety statute, enacted pursuant to the state's police power, to protect its forests from conflagration. If the action or omission prohibited by the state acting under its police power is one which poses an immediate threat of harm to the surrounding area and its inhabitants, or reasonably appears to do so, then such regulation should be binding on all citizens. Merely because a person is an Indian living on land held in trust for Indians by the United States should not be reason enough, in light of Public Law 280, for him to flout the state's public welfare and safety laws to the danger of himself and surrounding land and people.

Although a state's police power cannot directly regulate a subject which is allocated to the federal government by the Constitution or act of Congress, this Court has stated that it should never be held that Congress intends to supersede or suspend the exercise of the state's police power unless such purpose is clearly manifested. *Reid* v. *Colorado,* 187 U.S. 137 (1902). This Court also held that the exercise of a state's police power is superseded only where the repugnance or conflict is so "direct and positive" that the two laws cannot be reconciled. *Kelly* v. *Washington,* 302 U.S. 1, 10 (1937).

There is no "direct and positive conflict" between California Public Resources Code § 4291 and any Department of the Interior regulation. The Secretary of the Interior has issued regulations governing the leasing of land within Indian reservations (25 C.F.R., part 131), the management of Indian forests (25 C.F.R., part 141), and the grazing of livestock on Indian ranges (25 C.F.R., part 151). Provision is also made for the extinguishing of uncontrolled fires on Indian land (25 C.F.R., part 141.9). An examination of these regulations reveal that they do not in any manner concern fire prevention measures in mountainous or forested Indian lands which contain dwellings and other structures.

Petitioner additionally contends that "section 4291 authorizes only neat suburban living" (Petition, pages 6–7). "The restrictions imposed by section 4291 . . . prevent such Indians from placing their houses in settings created by nature" (Petition, page 8). These statements are untrue. The California statute in question does not require appellant's home to be situated on a suburban-type lot, nor does it prevent him from placing his house "in settings created by nature." The only requirement is that garbage, debris, brush, and other *flammable* materials be cleared for an area of 30 feet around a dwelling or other struc-

ture in mountainous or forested lands.[2] Section 4291(a) also provides the following:

> "This subdivision does *not* apply to single specimens of trees, ornamental shrubbery, or *similar plants* which are used as ground cover, if they do not form a means of rapidly transmitting fire from the native growth to any building or structure." (Emphasis added.)

Petitioner is free to maintain his home in a natural setting complete with trees and other vegetation so long as flammable materials are cleared for an area of 30 feet.

It follows that under Public Law 280, 18 U.S.C. § 1162, California had the power and authority to prosecute petitioner for violation of California Public Resources Code § 4291. The federal statute and its accompanying legislative history conclusively demonstrate that it was the intent of Congress to grant the State of California the authority to undertake criminal prosecutions such as the one involved in the instant case.

B. A Fire Safety Statute Which Requires the Owner or Occupier of Property in a Mountainous Area to Maintain a Firebreak Around Buildings Does not "Encumber" the Property.

Petitioner additionally contends that California Public Resources Code § 4291 encumbers his property

[2] The amended complaint filed in the California Justice Court of the Burney Judicial District on December 6, 1968, indicates that petitioner was in violation of § 4291 because the following items were within 30 feet of a building: garbage, general debris, papers, dried grass, old wood, leaves, and overhanging trees, all constituting fire hazards. (Appendix C.) None of these items appear to constitute a "setting created by nature."

since it makes his land less valuable in monetary and nonmonetary terms (Petition, page 8). The case of *Snohomish County* v. *Seattle Disposal Company,* 70 Wash.2d 688, 425 P.2d 22 (1967), *cert. denied,* 389 U.S. 1016, is cited in support of this assertion. The *Snohomish* case held that a county could not obtain an injunction restraining a refuse company from using land leased from Indians as a dumping ground because the county's ordinance constituted an encumbrance on the property in violation of a Washington statute and 28 U.S.C. § 1360.

Petitioner, in relying on this case, seeks to equate California Public Resources Code § 4291 with a zoning ordinance. A fire safety provision cannot be considered the equivalent of a zoning ordinance. Zoning regulations prescribe what uses can and cannot be made of particular land. They may set forth requirements with regard to lot and building size, as well as to whether particular land can be used for commercial, residential, or industrial purposes. *See e.g., Nectow* v. *Cambridge,* 277 U.S. 183 (1928); *Zahn* v. *Board of Public Works,* 274 U.S. 325 (1927); *Euclid* v. *Amber Realty Co.,* 272 U.S. 365 (1926); *City of Moline Acres* v. *Heidbreder,* 367 S.W.2d 568, 572 (Mo. Sup. Ct. 1963); *Angermeier* v. *Borough of Sea Girt,* 27 N.J. 298, 142 A.2d 624, 629 (1958). The *Snohomish* case held that an encumbrance resulted because the "application of the zoning ordinance to prohibit or limit the use of this land for commercial purposes certainly could be considered to diminish its value." 425 P.2d

at 26. A fire safety statute, such as section 4291, does not in any manner prohibit or limit the use of land for commercial or any other purposes, nor does it regulate building or lot size. It merely requires, regardless of the use made of the land, that brush, rubbish, and other flammable materials be cleared and a firebreak maintained for an area of 30 feet surrounding a building in order to prevent needless fires.

> The Washington Court in *Snohomish* held that: " . . . any 'burden upon land depreciative of its value, such as a lien, easement, or servitude which, though adverse to the interest of the landowner, does not conflict with his conveyance of the land in fee' constitutes an encumbrance." 425 P.2d at 26.

The term "encumbrance" has also been defined as "any right to, or interest in, land which may subsist in third persons, to the diminution of the value of the estate of the tenant, but consistently with the passing of the fee." *Kirkwood* v. *Arenas,* 243 F.2d 863, 867 (9th Cir. 1957). *See also Miller* v. *Schwinn,* 113 F.2d 748, 751 (D.C. Cir. 1940). Neither of these definitions would include a firebreak requirement within the meaning of the term. It would not be a burden on petitioner's land "depreciative of its value" to require that it be so maintained as not to be a hazard to surrounding forest lands.

As the California Court of Appeal pointed out in the opinion below, Congress used the term "encumbrance" in 18 U.S.C. § 1162 in the same series as the word "alienation." It thus appears that Congress in-

tended to protect the Indian against his own profligacy, not against a legitimate exercise of a state's police power to protect his health and safety as well as those around him.

This Court denied a petition for certiorari in the *Snohomish* case over the dissents of Justices Douglas and White. 389 U.S. 1016. In dissenting from the Court's action Mr. Justice Douglas made the following comments:

> "Subjecting respondent lessee to state regulations on garbage and sewage disposal seems no more a burden or encumbrance on the Indians' rights to lease their lands than the state tax on oil production of the non-Indian lessee in *Oklahoma Tax Comm'n* [*Oklahoma Tax Comm'n* v. *Texas Co.*, 336 U.S. 342] was a burden or encumbrance on the rights of the Indians there involved to make oil leases. In *Oklahoma Tax Comm'n* we said: 'These cases present no question concerning the immunity of the Indian lands themselves from state taxation. There is no possibility that ultimate liability for the taxes may fall upon the owner of the land.' 336 U.S. at 353. The same proposition, in a different context, may be true here, since all petitioner demands is that respondent Disposal Company obtain a refuse disposal use permit before commencing operations.
>
> "There may also be merit to the dissent's view that the immunity of Indian lands to a state 'encumbrance' cannot frustrate state programs to check air and water pollution. The States should, perhaps, be able to prevent sewage dumped on Indians' lands from draining into streams which

flow into water supplies outside Indian lands. The same is true of smoke from garbage burned on Indian lands that contributes to smog over nearby cities. State controls in this area may be permissible by virtue of 25 U.S.C. § 231, whether or not they are achieved under the label 'zoning' rather than 'sanitation regulations.'" 389 U.S. 1016, 1019–1020.

II. The due process clause of the Fourteenth Amendment did not bar the prosecution of petitioner

Petitioner contends that he cannot be prosecuted for violation of California Public Resources Code § 4291 because he has not been afforded fair notice that his failure to comply with the law could be punished, especially in view of the *Snohomish* case and Opinion M-36768 of the Interior Department Solicitor (Petition, page 9). Contrary to this assertion, petitioner has been afforded fair warning that such conduct could and would be prosecuted.

It is settled that a person is presumed to know the law. *Town of South Ottawa* v. *Perkins,* 94 U.S. 260 (1876); *Macias* v. *Commissioner of Internal Revenue,* 255 F.2d 23, 28 (7th Cir. 1958); *MacFarlane* v. *Department of Alcoholic Bev. Control,* 51 Cal.2d 84, 90, 330 P.2d 769 (1958). Public Law 280, 18 U.S.C. § 1162, which provides that California laws may be enforced against Indians living on trust lands so long as there is no alienation, encumbrance, or taxation, was enacted in 1953. This statute is sufficient to provide notice that section 4291 could be enforced against petitioner. Since section 4291 was enacted in 1965,

petitioner was placed on notice concerning the firebreak requirements applicable to his land.

The *Snohomish* decision, a Washington state court case, is of no consequence concerning notice since no presumption exists that a person knows the law of another state (*Smeltzer* v. *White*, 92 U.S. 390 (1875)), and it is not asserted that petitioner had actual notice of that case. Furthermore, since *Snohomish* dealt with a zoning ordinance on leased Indian land, it would not indicate to appellant that his failure to comply with California Public Resources Code § 4291 would not be punished. Assuming *arguendo* that petitioner had actual notice of the *Snohomish* case, he would not be warranted in concluding that a similar result would be applied in California in a nonzoning case where an encumbrance on land was not involved.

Solicitor's Opinion M-36768 cannot be used to shield petitioner from notice of Public Law 280. As discussed *supra,* this opinion is unsound in that it misreads the provisions of 18 U.S.C. § 1162. Furthermore, petitioner has not alleged that he had actual notice of the opinion and there is no presumption that a person has actual notice of such a document. *See Van Antwerp* v. *United States*, 92 F.2d 871, 875–876 (9th Cir. 1937); *American Safety Razor Corp.* v. *United States,* 6 F.Supp. 293, supplemented 7 F.Supp. 196 (Ct.Cl. 1934), *cert. denied* 293 U.S. 599.

It appears from the record that petitioner has been afforded actual notice that his failure to maintain a firebreak would lead to prosecution. The amended complaint charging petitioner with violation of section

4291 filed in the California Justice Court of the Burney Judicial District on December 6, 1968, indicates that Officer Kittell of the Forest Service personally inspected petitioner's land several times between June 1, 1968, and December 3, 1968 (Appendix C). It appears that Officer Kittell advised petitioner that the garbage, debris, paper, and other flammable materials must be cleaned up or charges would be brought. In spite of such warnings, petitioner refused to comply. He cannot now complain that he had no notice that he could be prosecuted.

CONCLUSION

Respondent submits that for the foregoing reasons, the instant petition for writ of certiorari should be denied.

EVELLE J. YOUNGER
Attorney General
of the State of California

DORIS H. MAIER
Assistant Attorney General

DANIEL J. KREMER
Deputy Attorney General

LOREN E. McMASTER
Deputy Attorney General
Attorneys for Respondent

§ 4291. Firebreaks; trimming of trees; chimney screens; variance or exemption by regulations of state forester

Any person that owns, leases, controls, operates, or maintains any building or structure in, upon, or adjoining any mountainous area or forest-covered lands, brush-covered lands, or grass-covered lands, or any land which is covered with flammable material, shall at all times do all of the following:

(a) Maintain around and adjacent to such building or structure a firebreak made by removing and clearing away, for a distance of not less than 30 feet on each side thereof or to the property line, whichever is nearer, all flammable vegetation or other combustible growth. This subdivision does not apply to single specimens of trees, ornamental shrubbery, or similar plants which are used as ground cover, if they do not form a means of rapidly transmitting fire from the native growth to any building or structure.

(b) Maintain around and adjacent to any such building or structure additional fire protection or firebreak made by removing all brush, flammable vegetation, or combustible growth which is located from 30 feet to 100 feet from such building or structure or to the property line, whichever is nearer, as may be required by the State Forester if he finds that, because of extra hazardous conditions, a firebreak of only 30 feet around such building or structure is not sufficient to provide reasonable fire safety. Grass and other vegetation located more than 30 feet from such building or structure and less than 18 inches in height above the ground may be maintained where necessary to stabilize the soil and prevent erosion.

(c) Remove that portion of any tree which extends within 10 feet of the outlet of any chimney or stovepipe.

(d) Maintain any tree adjacent to or overhanging any building free of dead or dying wood.

(e) Maintain the roof of any structure free of leaves, needles, or other dead vegetative growth.

(f) Provide and maintain at all times a screen over the outlet of every chimney or stovepipe that is attached to any fireplace, stove, or other device that burns any solid or liquid fuel. The screen shall be constructed of nonflammable material with openings of not more than one-half inch in size.

(g) The State Forester may adopt regulations exempting structures with exteriors constructed entirely of nonflammable materials, or conditioned upon the contents and composition of same, he may vary the requirements respecting the removing or clearing away of flammable vegetation or other combustible growth with respect to the area surrounding said structures.

No such exemption or variance shall apply unless and until the occupant thereof, or if there be no occupant, then the owner thereof, files with the State Forester, in such form as the State Forester shall prescribe, a written consent to the inspection of the interior and contents of such structure to ascertain whether the provisions hereof and the regulations adopted hereunder are complied with at all times.

UNITED STATES CODE, TITLE 18

§ 1162. State jurisdiction over offenses committed by or against Indians in the Indian country

(a) Each of the States or Territories listed in the following table shall have jurisdiction over offenses

committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

State or Territory of	Indian country affected
Alaska	All Indian country within the Territory
California	All Indian country within the State
Minnesota	All Indian country within the State, except the Red Lake Reservation
Nebraska	All Indian country within the State
Oregon	All Indian country within the State, except the Warm Springs Reservation
Wisconsin	All Indian country within the State

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with re-

spect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

(c) The provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section.

UNITED STATES CONSTITUTION

Fourteenth Amendment

Citizenship, Representation, and Payment of Public Debt

Citizenship

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Apportionment of Representatives

SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Disqualification for Public Office

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State Legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Public Debt, Guarantee of

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Power of Congress

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

IN THE

JUSTICE COURT OF MOUNTAIN JUDICIAL DISTRICT

County of Shasta, State of California

The People of the State of California,
Plaintiff,
vs.
WILLARD RHODES,
Defendant.

COMPLAINT---CRIMINAL

Personally appeared before me, this 28th day of October 1968, IRA T. KITTELL of U. S. FOREST SERVICE on information and belief, in the County of Shasta, who, being first duly sworn/complains and accuses WILLARD RHODES of the crime of misdemeanor, to-wit: VIOLATION OF 04291, PUBLIC RESOURCES CODE,

committed as follows:

That said WILLARD RHODES from on or about the 1st day of June, 1968 to the present time, at Mountain Judicial District and in the County of Shasta, State of California, did wilfully and unlawfully fail to maintain a firebreak around a building but not less than thirty (30) feet of each side thereof or to the property line whichever is near.

BEST AVAILABLE COPY

Said complainant therefore prays that a warrant may be issued for the arrest of the said WILLARD RHODES and that he be dealt with according to law.

/s/ IRA T. KITTELL

Subscribed and sworn to before me this 28th day of October A. D., 1968

/s/ JOSEPH BERTAGNA
Judge of said Judicial District

JUSTICE COURT OF BURNEY JUDICIAL DISTRICT

County of Shasta, State of California

The People of the State of California,
Plaintiff,
vs.

WILLARD WESTLY RHOADES
Defendant.

BEST AVAILABLE COPY

AMENDED COMPLAINT---CRIMINAL

Personally appeared before me, this 6th day of December 19 68, WILLIAM R. LUND, JR. of DEPUTY DISTRICT ATTORNEY on information and belief, in the County of Shasta, who, being first duly sworn, complains and accuses WILLARD WESTLY RHOADES of the crime of misdemeanor, to-wit: VIOLATION OF SECTION 4291, PUBLIC RESOURCES CODE,

committed as follows:

That said WILLARD WESTLY RHOADES on or about the 1st day of June, 19 68 from to the present time at Burney Judicial District and in the County of Shasta, State of California,

did wilfully and unlawfully fail to maintain a firebreak around a building but not less than thirty (30) feet of each side thereof or to the property line whichever is nearer.

THIS COMPLAINT IS BASED ON THE FOLLOWING FACTS:

On information received from Officer Kittell of the Forest Service, who has personally inspected defendant's property in question several times within the above period, the latest inspection being on the 3rd day of December, 1968. The above named defendant's property has been during this entire period and is still in violation of Section 4291 of the Public Resources Code. Garbage, general debris, papers, dried grass, old wood, leaves and overhanging trees all constituting fire hazards, were and are present on the defendant's property within thirty (30) feet of a building thereon.

Said complainant therefore prays that a warrant may be issued for the arrest of the said WILLARD WESTLY RHOADES and that he be dealt with according to law.

WILLIAM R. LUND, JR.

Subscribed and sworn to before me this 6th day of December A. D., 19 68

CAROLE VOSSEN

CAROLE VOSSEN,
Notary Public in and for said State & County.

#2 - Copy of warrant not available

It appearing to be that the offense of .....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

as charged and set out in the within complaint .....

has been committed, and that there is sufficient cause to believe the within named .....

guilty thereof, I order that he , be held to answer the same, and that he be admitted to bail in the sum of ..... dollars and he hereby committed to the Sheriff of Shasta County, until he give such bail.

Dated ....., 19 .....

JUDGE OF SAID JUDICIAL DISTRICT

No. .....

Docket ..... Page .....

JUSTICE COURT

JUDICIAL DISTRICT

County of Shasta

The People of the State of California, Plaintiff

vs.

..... Defendant

Complaint – Criminal

Filed ....., 19 .....

Judge of said Judicial District

Filed ....., 19 .....

Clerk.

By .....

Deputy Clerk.

APPENDIX D

COSHOW AND BARR
ATTORNEYS AT LAW
1428 WEST STREET
REDDING, CALIFORNIA 96001
(916) 241-6468

JUSTICE COURT OF BURNEY JUDICIAL DISTRICT

COUNTY OF SHASTA, STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

vs.

WILLARD WESTLY REOADES,

Defendant.

No. 11-226

APPELLANT'S PROPOSED SETTLED STATEMENT

Sufficient facts were found at the trial hereof to convict the appellant of a violation of Section 4291 of the Public Resources Code of the State of California if that section is applicable to Indian trust lands. It is conceded that at the time and place charged the appellant did not maintain the firebreak required by that section.

COSHOW AND BARR

By JOHN D. BARR
JOHN D. BARR

CERTIFICATE OF MAILING (C.C.P. 2015.5)

The undersigned, at Redding, California certifies to be true, under penalty of perjury, that she is over 18 years old, not a party to the within action, business address is 1428 West Street, Redding, California, and is in delivery service to U. S. Mail at each place addressed that she executed this certificate and served a true copy of the foregoing document by mail, by placing same in an envelope, sealing, fully prepaying postage thereon, and depositing said envelope in U. S. Mail at Redding, California, on the 3rd day of Sept 19 68 said envelope was addressed as follows:

Ila J. Reynolds
Ila J. Reynolds

William R. Lund, Jr.
Deputy District Attorney
Courthouse
Redding, California

BEST AVAILABLE COPY

IN THE JUSTICE COURT OF BURNEY JUDICIAL DISTRICT,

COUNTY OF SHASTA, STATE OF CALIFORNIA.

--ooOoo--

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. WILLARD RHOADES, Defendant.	No. 11-226 RESPONDENT'S PROPOSED SETTLED STATEMENT

Respondent concurs with appellant's proposed settled statement submitted heretofore.

DATED: November 14, 1969

ROBERT W. BAKER
District Attorney

By

WILLIAM R. LUND, JR.
Deputy District Attorney

BEST AVAILABLE COPY

(a) The following objectives are to be sought in the management of unallotted Indian forest lands in accordance with the principles of sustained yield:

(1) The preservation of such lands in a perpetually productive state by providing effective protection, by applying sound silvicultural and economic principles to the harvesting of the timber, and by making adequate provision for new forest growth as the timber is removed.

(2) The regulation of the cut in a manner which will insure method and order in harvesting the tree capital, so as to make possible continuous production and a perpetual forest business.

(3) The development of Indian forests by the Indian people for the purpose of promoting self-sustaining communities, to the end that the Indians may receive from their own property not only the stumpage value, but also the benefit of whatever profit it is capable of yielding and whatever labor the Indians are qualified to perform.

(4) The sale of Indian timber in open competitive markets in accordance with good business practices on reservations where the volume that should be harvested annually is in excess of that which is being developed by the Indians.

(5) The preservation of the forest in its natural state wherever it is considered, and the authorized Indian representatives agree, that the recreational or aesthetic value of the forest to the Indians exceeds its value for the production of forest products.

(6) The management of the forest in such a manner as to retain its beneficial effects in regulating water run-off and minimizing erosion.

(7) The preservation and development of grazing, wildlife, and other values of the forest to the extent that such action is in the best interest of the Indians.

(b) Similar objectives are sought in the management of allotted Indian forest lands, but, in addition, the sales of timber shall be based upon a consideration of the needs and best interests of the Indian owner and his heirs. The Secretary shall take into consideration, among other things:

(1) The state of growth of the timber and the need for maintaining the productive capacity of the land for the benefit of the owner and his heirs.

(2) The highest and best use of the land, including the advisability of devoting it to other uses for the benefit of the owner and his heirs.

(3) The present and future financial needs of the owner and his heirs.

BEST AVAILABLE COPY

Supreme Court, U.S.
FILED
SEP 25 1971
E. ROBERT SEAVER, CLERK

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 70-126

WILLARD RHOADES,

Petitioner,

v.

CALIFORNIA,

Respondent.

REPLY BRIEF

George F. Duke
Lee J. Sclar
William P. Lamb
CALIFORNIA INDIAN LEGAL SERVICES
2527 Dwight Way
Berkeley, California 94704
(415) 845-6171

John D. Barr
Coshow and Barr
1428 West Street
Redding, California 96001
(916) 241-3468

Attorneys for Petitioner

BASIS FOR REPLY BRIEF

The Brief for the State of California raises four points not discussed in the Petition for Certiorari. A reply brief is therefore proper under Sup. Ct. Rule 24, Subd. 4.

NEW ISSUES RAISED BY THE STATE

I. Does the legislative history of 18 U.S.C. §1162 demonstrate an intent to make Indian trust lands subject to state land use controls?

II. Are "forest lands", as used in 14 CFR 141.3, and "forest-covered lands", as used in Public Resources Code §4291 logically distinguishable and do these two laws contain conflicting provisions?

III. Are allegations of the presence of "garbage, papers, and general debris" relevant to a prosecution under Public Resources Code §4291?

IV. Does a warning delivered by a Forest Service officer allow prosecution under a statute which otherwise would be void for vagueness?

ARGUMENT

I

THE LEGISLATIVE HISTORY OF 18 U.S.C. §1162 DOES NOT DEMONSTRATE AN INTENT TO SUBJECT INDIAN TRUST LANDS TO STATE LAND USE CONTROLS.

18 U.S.C. §1162 is section 2 of H.R. 1063, 83d Cong, 1st Sess. The State quotes from H.R. 1063 as it was first introduced in the Congress in an effort to show that later rewording of the bill evidences an intent to allow states to apply their land use regulations except when they conflict with a particular federal law. A closer look at the legislative history demonstrates that no such intent was manifested. Congress changed H.R. 1063 for technical reasons and did not intend to change the rule that state law is inconsistent with federal Indian laws whenever federal law occupies a field of Indian activity, as in Warren Trading Post v. Arizona Tax Commission, 380 U.S. 685 or the area of land use.

A total of six bills were introduced into the House of Representatives during the first session of the 83d Congress dealing with the creation of state criminal and civil jurisdiction over Indian lands.[1] Each of these bills, however, applied to only one state. H.R. 1063, for instance, applied only to California. It was sent into committee along with the five other bills.

Senator Thye had introduced in the Senate S.2467, which also was aimed at creating state criminal and civil jurisdiction over Indian lands. Unlike the House bills, however, S.2467 dealt with four of the five states covered by the House bills.

---

1. H.R. 1063 applied only to California; H.R. 3404 applied only to Oregon; H.R. 4592 applied only to Minnesota; H.R. 4367 applied only to Nevada; and H.R. 1837 and H.R. 3494 applied only to Wisconsin.

The House Interior Committee amended H.R. 1063 to read exactly the same as S.2467. By doing so it obviated the necessity of reconciling Senate and House versions of similar bills and consolidated four bills which were pending before it into one.2 Undoubtedly considerations of efficiency were at the base of this decision, not broad policy determinations as the State contends. A glance at either the Committee report (House Rept. No. 848, 83d Cong., 1st Sess., 1953) or the remarks upon passage of the bill (99 Cong. Rec. 10782 (1953) supports this view, since in neither instance was there any discussion of the changed wording which the state contends demonstrates the legislative intent to broaden state jurisdiction to include Indian land use controls.

II

PUBLIC RESOURCES CODE §4291 and 25 CFR §141.3 BOTH ATTEMPT TO REGULATE FOREST LANDS AND CONTAIN MUTUALLY CONFLICTING PROVISIONS.

The State contends that Public Resources Code §4291 and 25 CFR §141.3 are not in conflict since the latter applies to "forest

---

2. The fact that Nevada was not included in the amended H.R. 1063 and that Nebraska was added reflects the treatment of those two states in S.2467 and adds further support to the contention that the House's intent was merely to adopt S.2467 in toto for technical reasons of efficiency and not broad policy considerations.

lands" and not to lands on which Indian homesites or other structures are maintained. The distinction of forest lands from homesites is entirely without merit, as it is inconsistent with both the logical reading of the statutes involved here and the traditions of the Indian people.

24 CFR §141.3 is a comprehensive federal regulation dealing with "Indian forest lands". A state statute, such as Public Resources Code §4291, which commands the cutting and removal of "all flammable vegetation or other combustible growth" within thirty feet of any structure (a minimum area of 3600 sq.ft.) certainly conflicts with 25 CFR 141.3 which sets out in some detail when and under what conditions the timber land is to be cut. As such, state regulation here transgresses upon that area which has specifically been reserved to the federal government under 18 U.S.C. §1162(b).

The state attempts to ignore this conflict by distinguishing between "forest lands" and lands upon which Indians have built their homes. The state, however, is unable to advance any reason why Indians may not place their homes upon "forest lands", but merely contends that the concepts are somehow mutually exclusive. Such a conclusion is not only unnecessary but is in conflict with the very statute the state relies upon for conviction in this case. Public Resources Code §4291 applies to "any building or structure... upon...forest-covered lands." Certainly the state cannot contend that there is to be a distinction between the "forest lands" of 25 CFR §141.3 and the "forest-covered lands" of Public Resources Code §4291. That the two statutes apply to the same type of land and that their provisions conflict should be evident.

III.

A WARNING DELIVERED BY A FOREST SERVICE OFFICER CANNOT LEGITIMIZE A PROSECUTION UNDER A STATUTE WHICH OTHERWISE WOULD BE VOID FOR VAGUENESS.

The State contends that the warnings issued by a Forest Service officer were sufficient to put petitioner on notice that he could be prosecuted under Public Resources Code §4291 and that he cannot now be heard to complain of the vagueness of the statute. That position is contrary to Lanzetta v. New Jersey 306 U.S. 451 (1939), cited in the petition. The Court in Lanzetta was concerned that statutes give fair warning of the actions which they prohibit. The Court there said:

> A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its very meaning and differ as to its application, violates the first essential of due process of law.

Both the Interior Department Solicitor (Opinion M-36768 at 2) and the Supreme Court of the State of Washington (Snohomish County v. Seattle Disposal Company 425 P.2d 22, (Wash. 1967), cert. denied 389 U.S. 1006) have differed with the State of California here in the applicability of land use controls under 18 U.S.C. §1162. That a Forest Service officer delivered his opinion to the petitioner on the meaning of the statute did not make the statute any less vague. It is the statute, not the Forest Service officer's order, that petitioner is